

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Oakland, California)

MORGAN ADVANCED CERAMICS

Employer

and

Case 32-RD-1434

ERNESTO CHACON, AN INDIVIDUAL

Petitioner

and

INTERNATIONAL ASSOCIATION
OF MACHINISTS and AEROSPACE
WORKERS, AFL-CIO, DISTRICT
LODGE 190, LOCAL LODGE 1414

Union

DECISION AND DIRECTION OF ELECTION

The Employer manufactures ceramic components in the Ceramics Division of its facility in Hayward, California. The Union has represented a collective bargaining unit of the Employer's employees for several years. The Petitioner, Ernesto Chacon, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to decertify the Union as the collective bargaining representative of the employees in the bargaining unit. A hearing officer of the Board held a hearing. The Employer filed a brief with me; the Union made an oral closing argument at the hearing; the Petitioner did not file a brief or make an oral closing argument.

As evidenced at the hearing and in the brief and closing argument, the parties disagree on whether Chacon is a member of the collective bargaining unit and should be eligible to vote.¹ As discussed below, I have concluded that Chacon was promoted to a position outside the unit and should not be eligible to vote. Accordingly, I am directing that a decertification election be held among the employees in the collective bargaining unit described below in this decision.² To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports my conclusions in this matter.

I. OVERVIEW OF OPERATIONS

The Employer manufactures ceramic components in the Ceramics Division of its facility in Hayward, California.³ Evidence presented at the hearing establishes that the Employer moved the Ceramics Division from Belmont, California to Hayward, California sometime in 2002.⁴ The Ceramics Division is part of the Operations Division, which is headed by Jason Bergquist, Vice President of Operations. Tim Nishimura, the operations

¹ The Union also contended at various points during the hearing that the petition should be dismissed because Chacon, who collected signatures in support of the petition, is a supervisor, manager or agent of the Employer. The Union did not present evidence showing that Chacon had Section 2(11) supervisory authority and did not allege that he was a statutory supervisor in its closing argument. The Union also correctly noted during the hearing that it recognizes that alleged unlawful employer involvement in seeking to decertify a union is not properly the subject of a representation case hearing, and the Union has pursued those issues in unfair labor practice charges.

² It is well settled that the unit appropriate in a decertification election must be coextensive with either the certified or recognized bargaining unit. *Fast Food Merchandisers, Inc.*, 242 NLRB 8 (1979). Here, the Employer has recognized and bargained with the Union since at least 2000. Such recognition is embodied in the current collective bargaining agreement between the Union and the Employer, and neither party disputes the appropriateness of the unit.

³ The parties stipulated, and I find, that during the past twelve months, the Employer has sold and shipped products valued in excess of \$50,000 directly to customers located outside the state of California.

⁴ In addition to the Ceramics Division, the Employer's Hayward facility includes a Metals Division, which makes braising alloys, and a Coatings Division, which applies dry film lubricants to metal parts.

manager, reports directly to Bergquist and is responsible for the daily operation of the plant. Reporting directly to Nishimura are Mark Aragona, who is in charge of Methods, Gay Sullivan, the master scheduler, Gordon Arakaki, who is in charge of Prototype, and Chacon, whose job title is department leader.

II. COLLECTIVE BARGAINING RELATIONSHIP

Employees in the Ceramics Division are represented by the Union. The record contains no evidence regarding the origination of the bargaining relationship between the Union and the Employer. However, the Union and the Employer have a current collective bargaining agreement effective by its terms September 11, 2000 to September 30, 2004; therefore, the Employer has recognized and bargained with the Union since at least 2000.⁵

III. STATUS OF PETITIONER CHACON

Petitioner Ernesto Chacon has been employed by the Employer for 27 years. He started working for the Employer as a machinist, and he continued in the machinist position until about three years ago, when he was promoted to the position of group leader in the Grinding department. After the Ceramics Division moved to Hayward in 2002, the Employer changed the job title from group leader to team leader. Every department has at least one team leader, in addition to the department supervisor. As the Grinding department team leader, Chacon reported to the Grinding department supervisor. The

⁵ The parties current collective bargaining agreement, effective by its terms September 11, 2000 to September 30, 2004, recognizes the Union as the sole and exclusive bargaining agent for all regular full-time and part-time manufacturing operators, machine operators and maintenance technicians employed by the Employer at its facility located at 477 Harbor Drive in Belmont, California. However, the evidence presented at the hearing established that the Employer moved its operation to Hayward, California subsequent to signing the collective bargaining agreement. Petitioner Chacon testified that Employer relocated to Hayward, California in 2002. Jason Bergquist, the Employer's Vice President of Operations, also testified that the facility is currently located in Hayward, California.

Union does not dispute that Chacon was a bargaining unit member when he held the team leader position.

A. Overview of Chacon's Job as Department Leader

In about March 2003, Chacon was given the new job of department leader. Although Chacon has continued paying Union dues since becoming the department leader, the Union claims that he was promoted to a non-bargaining-unit position. The evidence presented at the hearing establishes that he was given the new assignment on a permanent, not temporary, basis. Chacon testified that no one in the company told him that his new position was temporary, and the Employer provided him with business cards that list his job title as department leader.⁶ Although he plans to retire in December 2003, Chacon testified that the department leader position is his permanent position until he retires.

In his new role, Chacon reports directly to Tim Nishimura, the operations manager. His job as department leader is to work with the various department heads, including supervisors and team leaders, to facilitate the expedited completion of parts that are overdue. Every Monday, Chacon receives a list of late parts from Nishimura. Then, he goes to the various departments where the parts are located and tells the supervisors or team leaders that the parts are late and need to be completed on an expedited basis. He finds out what work remains to be done on the parts and how quickly they can be completed. He then reports back to Nishimura regarding any problems with completing the late parts. He meets with Nishimura every afternoon, sometime after 2:30 p.m., and

⁶ The Employer's Vice President of Operations, Jason Bergquist, testified that Chacon's bargaining unit job description is Grinding CNC Expert Programmer, an expert machinist position. However, Bergquist conceded that Chacon's current duties do not match the duties of the machinist job description because Chacon does not operate machinery in his new position.

gives him a report on the status of the late parts. Nishimura then gives him further instructions about what to do to expedite the late parts and identifies which late jobs are priorities.

Chacon has a desk in an office area near Nishimura's office. He shares the office area with Nishimura's other direct subordinates, including Aragona, who is in charge of Methods, Arakaki, who is in charge of Prototype, and Ms. Sullivan, the master scheduler. Three engineers also use the office area.⁷ Ms. Sullivan supervises an expeditor, Duong Lam, but there is no evidence that the others in the office area are supervisors. Other than Chacon, whose bargaining unit status is in dispute, Arakaki is the only bargaining unit member in the office area.

Chacon testified that he spends about five to ten minutes per day working at his desk. The majority of his time is spent walking around to the various departments, identifying the work that has to be done to complete the late parts, and helping the other employees finish the late jobs. Although Chacon testified that he does not work on the machines in his new role as department leader, he also testified that when he goes to a department to check on a late part, he sometimes helps the other employees work to get the part finished.

The job title of department leader was apparently created for Chacon in his new position. There is no evidence that any other employee currently has the same job title, or that any other employee had the job title prior to Chacon.

B. Overview of the Expediter Job

Despite his department leader job title, one hundred percent of Chacon's job duties are the duties of an expeditor, a position that is not new to the Employer's facility. The Employer currently has one employee, Duong Lam, with the job title of expeditor. According to Bergquist, vice president of operations, an expeditor may be assigned to coordinate the completion of any job, particularly for an important customer, to make sure that the job is completed in a timely manner. An expeditor communicates with off-site vendors and negotiates prices with them. An expeditor also has direct contact with sales people and with customers. Ms. Lam, who has the job title of expeditor, currently performs all of these duties.

Prior to March 2003, when Chacon was given his new position, the Employer employed two expeditors, Ms. Lam and Patricia Lee. Ms. Lee was laid off by the employer in about March 2003, and at that time, the Employer transferred some of her expeditor responsibilities for the late jobs to Chacon in his new position. Chacon does not perform the full range of expeditor duties. He is responsible only for coordinating the completion of late jobs with the department supervisors and team leaders and for reporting to Nishimura about any problems with the completion of late jobs. He is not responsible for dealing with off-site vendors, sales people or customers. Although Chacon is not responsible for all of the expeditor duties, the testimony of both Chacon and Bergquist established that one hundred percent of his work is expeditor work.

C. Bargaining Unit Status of the Expediter Job

⁷ The engineers do not report to Nishimura. They report to the head of the Inspection Department.

The evidence establishes that the expediter position is excluded from the bargaining unit. Robert Hisle, a Union shop steward who was involved in negotiations for the 2000 collective bargaining agreement, testified that at the time of the negotiations, the bargaining unit included just the production employees, and excluded inspection employees, packaging employees and expediters. Bargaining for the 2000 contract involved just the production employees. The parties did not bargain about the wages or other working conditions of the expediters. Subsequent to the agreement on a contract, the inspection employees and packaging employees were added to the bargaining unit, and the contract was applied to them. Hisle testified that the expediters have not been added to the bargaining unit, and the contract has not been applied to them. Ms. Lam, an expediter, is not a bargaining unit member, nor was the former expediter, Ms. Lee. The bargaining unit description in the collective bargaining agreement does not mention the expediter position, and administrative employees are specifically excluded from the unit. Bergquist conceded that Chacon does administrative work in his current position.

D. Chacon Performs Exclusively the Duties of an Expediter and Should Be Excluded from the Bargaining Unit Voting in the Election.

It is well settled that the unit appropriate in a decertification election must be coextensive with either the certified or recognized bargaining unit. Fast Food Merchandisers, Inc., 242 NLRB 8 (1979). Here, the evidence establishes that the bargaining unit recognized by the Employer since at least 2000 does not include expediters and the expediters employed by the Employer have not been covered by the collective bargaining agreement. The bargaining unit also does not cover administrative personnel. The evidence also establishes that Chacon does not regularly perform any of the jobs included in the

recognized bargaining unit; he is not a manufacturing operator, machine operator, maintenance technician, inspection employee, or packaging employee. He has not operated machinery since he assumed his new department leader position. Although Chacon was not given the expeditor job title in his new role, the evidence clearly establishes that he performs exclusively the duties of an expeditor.⁸ He spends one hundred percent of his work time coordinating the completion of late parts and reporting their status to management. Despite his job title, I find that Chacon performs the work of an expeditor. Because expeditors are excluded from the bargaining unit recognized by the Employer, the appropriate unit for the decertification election must also exclude expeditors. Fast Food Merchandisers, Inc., 242 NLRB 8 (1979). Thus, I find that Chacon is excluded from voting in the decertification election.

IV. CONCLUSIONS AND FINDINGS

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

⁸ There is no testimonial or other evidence regarding why the Employer gave Chacon the department leader job title and not the expeditor job title.

5. The following employees of the Employer, hereinafter referred to as the Unit, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and part-time manufacturing operators, machine operators and maintenance technicians employed by the Employer at its facility located at 2425 Whipple Road in Hayward, California; excluding all office clerical employees, sales and administrative employees, guards, and supervisors as defined in the National Labor Relations Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, MACHINISTS AUTOMOTIVE TRADES, DISTRICT LODGE 190 OF NORTHERN CALIFORNIA AND LOCAL LODGE 1414.⁹ The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. [Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an](#)

⁹ Per the parties' collective bargaining agreement, this is "the Union" recognized by the Employer as the sole and exclusive bargaining agent for employees in the bargaining unit.

economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be

alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-521, on or before **December 29, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (432) 567-8911. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **January 2, 2004**. The request may **not** be filed by facsimile.

Dated at Oakland, California this **19th day of December, 2003**.

Alan B. Reichard
Regional Director
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

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